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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

LOCAL UNION NO. 5741,
UNITED MINE WORKERS OF AMERICA,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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June 27, 1989

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I.

QUESTION PRESENTED

Whether a successor union (Local 5741), which the Sixth Circuit concluded did not become Local 9639's successor voluntarily, can be liable for the unfair labor practices of its predecessor solely because it accepted members from the precedessor union.

II.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below were the petitioner, Local Union No. 5741, United Mine Workers of America, and the National Labor Relations Board. Before the Court of Appeals for the Sixth Circuit Local 5741 was designated petitioner/cross-respondent and the NLRB was designated respondent/cross-petitioner.

Petitioner, Local 5741, has no parent companies, subsidiaries, or affiliates. Local 5741 is an unincorporated labor organization within the meaning of Section 2(5) of the Act, 29 U.S.C. § 152(5). It is chartered by, and derives its existence from, the International Union, United Mine Workers of America.

TABLE OF CONTENTS

Page

I. QUESTION PRESENTED i

II. LIST OF PARTIES AND RULE 28.1 LIST ii

III. TABLE OF CONTENTS..... iii

IV. TABLE OF AUTHORITIES..... iv

OPINIONS BELOW..... 1

JURISDICTION..... 1

STATUTE 1

STATEMENT OF THE CASE..... 3

REASONS FOR GRANTING THE WRIT 5

A. *The Majority Opinion Of The Panel Of The Sixth Circuit Is In Error Because This Court's Decision In* Golden State Bottling Co. *Requires A Finding Of Willful And Knowing Assumption Of A Predecessor's Obligation Prior To Imposition Of Liability On A Successor* 5

B. *The Imposition Of Liability On Local 5741 Is Beyond The Board's Remedial Power Under Section 10(c)* 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES:

Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973) 5, 6, 7, 8, 9, 10

Howard Johnson v. Detroit Local Joint Board, Hotel & Restaurant Employees, 417 U.S. 249 ..... 8, 10

Marlene Industries Corp. v. NLRB, 712 F.2d 1011 (6th Cir. 1983) 8

NLRB v. Burns Security Services, 406 U.S. 272, 283-84 (1972) 7, 8, 10

NLRB v. East Side Shopper, Inc., 498 F.2d 1334 (6th Cir. 1974) 8

NLRB v. Edward Cooper Painting, 123 L.R.R.M. 2905 (6th Cir. 1986) 8

NLRB v. Local 46, Metallic Lathers, 727 F.2d 234 (2d Cir. 1984) 9

NLRB v. South Harlan Coal Co., 844 F.2d 380 (6th Cir. 1988) 8

Perma Vinyl Corp., 164 N.L.R.B. 968 (1967) 7

H.K. Porter Co. v. NLRB, 397 U.S. at 108-09 ..... 10, 12

United States Pipe & Foundry Co. v. NLRB, 398 F.2d 554 (5th Cir. 1968) 7

Vaca v. Sipes, 386 U.S. 171 (1967) 11

STATUTES:

National Labor Relations Act 10(c) 2, 5, 10

National Labor Relations Act 10(e) 2

28 U.S.C. § 1254(1) 2

TABLE OF AUTHORITIES – Continued

Page

29 U.S.C. § 157 11

29 U.S.C. § 160(c) 2

29 U.S.C. § 160(e) 2

29 U.S.C. § 411(a)(1) and (3) 11

OTHER:

P. Blumberg, THE LAW OF CORPORATE GROUPS: SUBSTANTIVE LAW (Little Brown 1987) 5

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NATIONAL LABOR RELATIONS BOARD,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Local 5741, respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled action on March 29, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 865 F.2d 733 and appears in the appendix hereto, p. 1a, *infra*.

JURISDICTION

Jurisdiction of the United States Court of Appeals for the Sixth Circuit was invoked by Local 5741 pursuant to Section 10(e) of the Act, 29 U.S.C. § 160(e). The NLRB invoked the Sixth Circuit's jurisdiction pursuant to the same provisions of the Act, filing a cross-petition to enforce its order.

On January 10, 1989, the Sixth Circuit entered an order enforcing the decision of the Board and denying Local 5741's petition for review. Local 5741 filed a petition for rehearing or rehearing *en banc*, which was denied by the Sixth Circuit in an order entered March 29, 1989.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE

Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), provides, in pertinent part, that:

> The testimony taken by such member, agent or agency of the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the board shall be of the opinion that any person named in the Complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its finding of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or

without back pay, as will effectuate the policies of this subchapter. . . .

STATEMENT OF THE CASE

On April 9, 1980, the NLRB issued an unfair labor practice complaint alleging that District 30, United Mine Workers of America, and Local Union No. 9639, violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended, by striking the mining operations of Beth-Elkhorn Corporation in an effort to cause the discharge of charging party Tommy E. Cook because he was not a member of the union.[1] On February 27, 1981, the NLRB issued its order adopting a decision of an administrative law judge finding that Local No. 9639 had violated Sections 8(b)(1)(A) and (2) of the Act by causing the constructive discharge of Tommy E. Cook on August 30, 1979.[2]

By order entered on August 19, 1982, the United States Court of Appeals for the Sixth Circuit directed Local 9639 to make Tommy Cook whole by paying back pay in the amount of $12,327.65.[3] On December 4, 1985, the Director for Region 9 of the NLRB issued an order directing a supplemental hearing on the issue of back pay.[4] The supplemental hearing was required because

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[1] Rec. 1. "Rec. ___" references are to the portions of the record on appeal contained in the joint appendix filed with the Sixth Circuit.

[2] Rec. 1, 13.

[3] Rec. 18.

[4] Rec. 19.

Local 9639 had ceased to operate as a local union, and a substantial majority of its members had transferred to Local 5741. The issue in the supplemental hearing was whether Local 5741 was a successor, liable for its predecessor's wrongs.

In a supplemental decision rendered on April 22, 1986, an administrative law judge found that Local 5741 was a successor to Local 9639 and, as such, was liable to Tommy Cook for all back pay and accrued interest.[5] The NLRB adopted the findings and conclusions of the hearing officer in an order dated June 18, 1987.[6] On petition for review by Local 5741 and cross-petition for enforcement by the NLRB, the Sixth Circuit enforced the Board's order and denied Local 5741's petition for review.

While the majority of the panel acknowledged that "it is probably true, as Local 5741 contends, that it did not become Local 9639's successor voluntarily,"[7] it nonetheless concluded that Local 5741's involuntary acceptance of its predecessor's members did not affect its successorship liability.[8]

Judge Duggan dissenting, noted that not only did the majority acknowledge that Local 5741 did not become a successor voluntarily, but the NLRB admitted that Local 5741 "was obligated to accept valid transferees as mem-

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[5] Rec. 23.

[6] Rec. 36.

[7] 865 F.2d at 737.

[8] *Id.* at 738.

bers."[9] In view of the foregoing, Judge Duggan concluded, as Local 5741 submits here, that the majority's decision misreads and misapplies this Court's successorship decisions, including the decision in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973).

REASONS FOR GRANTING THE WRIT

I.

The Majority Opinion Of The Panel Of The Sixth Circuit Is In Error Because This Court's Decision In *Golden State Bottling Co.* Requires A Finding Of Willful And Knowing Assumption Of A Predecessor's Obligation Prior To Imposition Of Liability On A Successor.

As a general proposition, common law doctrines of agency, piercing the corporate veil and enterprise liability are all remedial being aimed at providing relief for those who have been injured by persons or entities that are insolvent or otherwise insulated from suit.[10] These doctrines, while largely equitable, all have defined elements that require the courts to balance the public interest, the private interest in recovery, and the fairness of imposing responsibility vicariously in each case. In exercising its remedial powers under section 10(c) of the Act, the National Labor Relations Board has borrowed these common law concepts, incorporating them, for example, in

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[9] *Id.* at 739.

[10] *See generally* P. Blumberg, THE LAW OF CORPORATE GROUPS: SUBSTANTIVE LAW Ch. 1 (Little Brown 1987) (discussing limited liability and policies for disregarding).

the single employer, joint employer and alter ego doctrines.

The successorship doctrine, not unlike the common law doctrines discussed above, requires the Board to sift through entire congeries of facts; to weigh a multitude of factors, no one of which is controlling; and to do so against a backdrop of everchanging circumstances in which the interests of the successor, the public and the employee are accorded differing weights. While the Board's standards are necessarily imprecise, its decisions oftimes being based on unarticulated assumptions and unexpressed conclusions about the weight of the competing interests at stake, the courts are not wholly at sea in reviewing successorship findings. This Court's decisions identifying the purpose and limits of successorship determinations offer the lower courts some purchase on firm ground. The decision in *Golden State Bottling Company,*[11] although addressed to a successor employer's liability, is such a case.

In *Golden State Bottling Company,* this Court upheld a determination by the Board that a *bona fide* purchaser of assets could be ordered to remedy an unfair labor practice of the seller because the purchaser had knowledge of the seller's wrong at the time of the sale. While the Court acknowledged the limited scope of its review of the Board's factual findings,[12] it carefully examined whether the imposition of successorship liability exceeded the Board's remedial authority under section 10(c) of the Act.

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[11] 414 U.S. 168.

[12] 414 U.S. at 172-73.

The Court held that the Board's decision, based on standards announced in *Perma Vinyl Corp.*[13] for imposing liability on a successor employer for its predecessor's unfair labor practices, did not exceed the powers conferred by section 10(c) of the Act. Specifically, the Court deemed the Board's decision to be proper because it required, as a condition precedent to imposition of liability, that the purchaser have knowledge of the seller's wrongs at the time of the sale.[14]

In upholding the Board's imposition of liability on Golden State's successor, the Court emphasized that the decision in *NLRB v. Burns Security Services*[15] remained "unqualified."[16] *Burns* held that a successor cannot, consistent with the Board's authority under section 10(c) of the Act, be bound to its predecessor's obligations unless the Board finds that the successor agreed to be bound.[17]

The *Golden State* Court went on to explain that the successor's knowledge of the prior unfair labor practice was indispensable to the imposition of liability because such knowledge enabled the successor to protect itself.

> Since the successor must have knowledge before liability can be imposed, "his potential liability for remedying the unfair labor practices is a matter which

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[13] 164 N.L.R.B. 968, 969 (1967), *enf'd sub. nom. United States Pipe & Foundry Co. v. NLRB*, 398 F.2d 554 (5th Cir. 1968).

[14] 414 U.S. at 181 & n. 6.

[15] 406 U.S. 272, 283-84, 287 (1972).

[16] 414 U.S. at 181 & n. 6.

[17] 414 U.S. at 183-84.

> can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract.[18]

Put differently, the seller's knowledge of the unlawful act at the time of the sale provides evidence that the assets were purchased willfully, with knowledge of potential liability, at a time when the purchaser has the means to insulate itself should it choose to do so.

Obviously, the Court in *Burns* required a higher standard of willfulness for imposing a collective bargaining agreement than it did in *Golden State* for imposing liability for prior unfair labor practices. Yet, both cases require some level of knowing *and willful* assumption of another's obligations as a condition precedent to the imposition of liability. Local 5741 submits that there is no successorship decision of this Court that does not require some level of knowledge (which is tried to willfulness) as a condition precedent to imposing liability.[19]

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[18] *Id.* at 185.

[19] *See Howard Johnson v. Detroit Local Joint Board, Hotel & Restaurant Employees,* 417 U.S. 249, 254-55. *Compare NLRB v. South Harlan Coal Co.,* 844 F.2d 380, 382, 384-85 (6th Cir. 1988) (successorship upheld: purchased with knowledge); *Marlene Industries Corp. v. NLRB,* 712 F.2d 1011, 1020-21 (6th Cir. 1983), *denying enforcement in pertinent part,* 255 N.L.R.B. 1446 (no knowledge of wrong); *NLRB v. East Side Shopper, Inc.,* 498 F.2d 1334, 1336 (6th Cir. 1974) (successorship upheld: purchased with knowledge; *cf. NLRB v. Edward Cooper Painting,* 123 L.R.R.M. 2905, 2911 n. 8 (6th Cir. 1986) (alter ego finding upheld: knowledge and willfulness implicit elements of standard).

As the above cases demonstrate, and as the dissent correctly pointed out,[20] the opinion of the Sixth Circuit is in error because it fails to recognize that the knowledge requirement articulated in *Golden State* is not just one of many factors the Board considers in determining successorship. Rather, it is an indispensable element, which is aimed at assuring that the purchaser willfully acquired the assets with knowledge of the potential liability at a time when steps could have been taken to limit that liability.

In the present case, the NLRB admitted that Local 5741 "was obligated to accept valid transferees as members,"[21] a proposition that the majority accepted as true.[22] Given the foregoing, the majority's conclusion – that "[a]lthough Local 5741 may not have chosen to become the local's successor"[23] it is bound as a successor – clearly misconstrues the aim of the knowledge requirement and is inconsistent with every decision of this Court that has addressed the issue.[24]

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[20] 865 F.2d at 738-39.

[21] *Id.*

[22] *Id.* at 8-9.

[23] *Id.* at 10.

[24] For the above reasons, the Sixth Circuit's attempted distinction between this case and the decision in *NLRB v. Local 46, Metallic Lathers*, 727 F.2d 234, 237 (2d Cir. 1984), *denying enforcement in pertinent part*, 259 N.L.R.B. 70 (1981) is in error. Specifically, the distinction that *Metallic Lathers* found that the successor had no knowledge whereas it was "undisputed that Local 5741 knew of the unfair labor practice" fails to take into account that the knowledge requirement is aimed at assuring that there has been a *willful* assumption of another's obligations. 865 F.2d at 736.

B. The Imposition Of Liability On Local 5741 Is Beyond The Board's Remedial Power Under Section 10(c).

In exercising its remedial power under section 10(c), the Board cannot violate other policies of the Act.[25] This limitation extends to successorship findings.[26] Since neither this Court nor the Circuit courts have addressed union successorship liability, there are no settled standards that can be used here.

Local 5741 submits that common sense compels the conclusion that a union cannot be held responsible because it accepted union members when, had it acted otherwise, it would have arguably violated federal labor law.[27] While this fact alone should dispose of this case, other issues are raised.

Prior to deciding whether to accept members from Local 9639, how does Local 5741 weigh its duty to its present members against potential liability for refusing the membership applications? Could the NLRB compel Local 5741 to accept members of Local 9639 and then impose successorship liability? Could Local 5741 lawfully insist, as a condition precedent to accepting the new members, that each member pay his or her *pro rata* share

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[25] *H.K. Porter Co. v. NLRB*, 397 U.S. at 108-09.

[26] *Howard Johnson v. Detroit Local Joint Board, Hotel & Restaurant Employees, supra*, 417 U.S. at 254-55; *Golden State Bottling Co. v. NLRB*, 414 U.S. at 191 n. S 6; *NLRB v. Burns Security Services*, 406 U.S. at 283-84, 287.

[27] 865 F.2d at 737.

of back pay liability?[28] If so, how would such a requirement square with the section 7 rights of members of Local 9639[29] or the settled rule that individual union members are not personally liable for unfair labor practices?

Finally, if, as here, imposition of successorship liability on an innocent local threatens to cause the financial distruction of the successor local, what calculus exists under the National Labor Relations Act to balance this cost and the impairment of the rights of innocent union members against the injury to the wrongfully discharged employee? Local 5741 submits that there is no such formula and that the only proper consideration is this:

> [The] public interest in effectuating the policies of the federal labor laws, not the wrong done the individual employee, is *always* the Board's principal concern in fashioning unfair labor practice remedies.[30]

In summary, it is apparent from the opinion of the Sixth Circuit that the majority was animated in large part by its concern that, absent a finding of successorship, a wrong would go unremedied. This concern is legitimate and understandable. However, it is not a concern that authorizes the Board to fashion remedies that themselves violate the Act or a concern that enables the courts, under the guise of limited judicial review, to blink Board action that undermines federal labor policy. In cases such as

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[28] 29 U.S.C. Section 411(a)(1) and (3) (equal rights of members and no special assignments).

[29] 29 U.S.C. Section 157.

[30] *Vaca v. Sipes*, 386 U.S. 171, 182 n. 8 (1967) (emphasis added).

this, in which the Board's remedial power is insufficient to resolve an important labor problem

> it is the job of Congress, not the Board or the courts [to remedy]. . . .[31]

CONCLUSION

For these reasons, Local 5741 urges that this petition for certiorari should be granted.

Respectfully submitted,

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[31] *H.K. Porter Co. v. NLRB*, 397 U.S. at 109.

APPENDIX

Nos. 87-5962/6167

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LOCAL UNION NO. 5741, UNITED MINE WORKERS OF AMERICA, *Petitioner, Cross-Respondent,* v. NATIONAL LABOR RELATIONS BOARD, *Respondent, Cross-Petitioner.*	ON PETITION for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

Decided and Filed January 10, 1989

Before: KEITH and NELSON, Circuit Judges, and DUGGAN, District Judge.*

NELSON, Circuit Judge, delivered the opinion of the Court, in which KEITH, Circuit Judge, joined, DUGGAN, District Judge, (pp. 11-13) delivered a separate dissenting opinion.

DAVID A. NELSON, Circuit Judge. The question for decision in this case is whether the National Labor Relations Board erred in holding that the petitioning United

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*The Honorable Patrick J. Duggan, United States District Judge for the Eastern District of Michigan, sitting by designation.

Mine Workers local union is the "successor," for labor law purposes, of another UMW local, now defunct, that had an unsatisfied monetary obligation as a result of having committed an unfair labor practice. Petitioner seeks review of a Board order making it responsible for the other local's debt, and the Board cross-petitioners for enforcement. For the reasons stated below, we shall grant the Board's cross-petition for enforcement.

I

The defunct union, Local Union No. 9639 of the United Mine Workers of America, committed an unfair labor practice by causing the discharge of a non-union miner. The NLRB ordered the local to pay the miner his lost earnings. It was stipulated that the amount of Local 9639's liability came to $12,327.65, plus interest.

On August 19, 1982, this court granted enforcement of the NLRB order. About two weeks later Local 9639 filed a petition under Chapter 7 of the Bankruptcy Code, 11 U.S.C. §§ 701 *et seq.*, expecting to obtain a discharge of its debt to the miner. The Board filed a proof of claim on the miner's behalf, and he was awarded all of Local 9639's monetary assets, about $2100. Local 9639 asked the bankruptcy court for authority to continue to operate, but on September 27, 1982, after learning that the unpaid balance of its debt was not dischargeable, the local withdrew the motion and simply ceased to function. The local ultimately surrendered its charter to the UMW.

Between October 21 and November 9, 1982, every one of the approximately 55 working members of Local 9639 transferred his membership to Local 5741. The latter

local had theretofore had approximately 132 active and 356 inactive members. By November 23 approximately 190 of 243 idle or retired members of Local 9639 had also transferred to to Local 5741. These transfers resulted from "bathhouse talk" in which individual members of Local 9639 discussed the proximity of Local 5741 to themselvs and the mines in which they worked. Nineteen retired members of Local 9639 eventually transferred to other UMW locals.

At the time of the transfers into Local 5741, that local's president knew that the defunct local had been found guilty of an unfair labor practice and had been ordered to pay the discharged miner his lost wages. Local 5741 also knew, through its president, that Local 9639 had ceased to function as a result of the Board-imposed liability. No money or property of Local 9639 was transferred to Local 5741.

Under the constitution of the UMW, no transfer fees were payable by the members of Local 9639. Neither did the transferees have to execute new dues deduction authorization cards on behalf of Local 5741. The employer continued to remit dues to District 30 of the UMW for the Local 9639 members, just as it had done in the past. These remittances was designated for Local 9639 until at least Dember of 1982, when the secretary-treasurer of District 30 requested that the name of Local 5741 be used. Dues remitted for the defunct local were never returned by District 30. Instead, District 30 kept one-third for itself, remitted one-third to the UMW, and remitted the remainder to Local 5741.

Once the members of Local 9639 had transferred to Local 5741, that local began to act as their collective bargaining representative. Although no officers of Local 9639 became officers of Local 5741, the president of Local 5741 immediately reappointed eight transferees to their old positions on mine and safety committees. It is undisputed that Local 5741 took over representation of Local 9639's former members without any hiatus and that Local 5741 administered on their behalf the same collective bargaining agreement previously administered by Local 9639. Grievances of Local 9639 members arising prior to the transfer were processed by Local 5741.

On December 4, 1985, a regional director of the NLRB ordered that a supplemental hearing be held to determine whether Local 5741 was jointly and severally liable with Local 9639 for the balance of the back pay due the discharged non-union miner. The hearing resulted in a finding that Local 5741 was the successor to Local 9639 for purposes of Local 9639's unsatisfied backpay obligation, and the finding was ultimately adopted by the Board. The Board's findings of fact are conclusive if supported by substantial evidence, 29 U.S.C. § 160(e), and the foregoing facts, which we have adopted from the Board's decisions, are supported by substantial evidence.

II

Congress gave the NLRB authority to determine the remedies for labor organizations' unfair labor practices, to the end that a uniform national policy might be developed and enforced. *Garner v. Teamsters*, 373 Pa. 19, 94 A.2d 893, *aff'd*, 346 U.S. 485 (1953). It is the Board's task

to devise remedies that effectuate the policies of the Act, *Fibreboard Paper Prods. Corp. V. NLRB*, 379 U.S. 203, 215-16 (1964), and a reviewing court must give special respect to the remedies chosen by the Board, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n. 32 (1969). A remedial order will not be disturbed unless it represents a patent attempt to achieve ends contrary to the Act. *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943); *J.P. Stevens & Co. v. NLRB*, 623 F.2d 322, 327 (4th Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981).

Permitting a disappearing employer's unfair labor practices to go unremedied contributes to labor unrest, particularly where there is continuity in the employing industry; where there is substantial continuity between enterprises, a successor's failure to remedy its predecessor's unfair labor practices may appear to employees to be a continuation of the predecessor's labor policies. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973). Similar considerations would seem to apply, *mutatis mutandis*, where a disappearing local union has committed an unfair labor practice, and there is substantial continuity between that local and one that continues to operate.

The Board's remedial powers under § 10(c) of the Act include the power to order a bona fide successor employer who has not committed an unfair labor practice to reinstate and provide back pay to an employee wrongfully discharged by the predecessor employer. *Golden State Bottling Co.*, 414 U.S. at 175-77. The decision whether to impose such liability involves striking a balance between the conflicting interests of the innocent successor, the public, and the victimized employee, *id.* at 181, and the Board is uniquely qualified to make that kind of

judgment. The Board is no less qualified to make the similar judgment called for by the facts of this case.

III

The test of successorship, in the employer situation, is whether there is "substantial continuity" between the enterprises. *Fall River Dyeing & Finishing Corp. v. NLRB*, ___ U.S. ___, ___, 107 S.Ct. 2225, 2236 (1987). The successorship question is primarily factual in nature and involves consideration of a number of factors:

> "Whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisor; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers."

Id. Such indicia of continuity are all to be fed into the "substantial continuity" calculus, and the presence of absence of a single factor is not determinative. All the circumstances must be evaluated, with particular attention being paid to whether employees who have been retained will view their job situations as substantially unaltered. *Id.* at 2236-37. The labor law doctrine of successorship is a broad one, and as long as there is continuity in the "employing industry," the public policies of the doctrine will be served by its broad application. *Golden State Bottling Co.*, 414 U.S. at 182 n. 5.

The NLRB first applied its successor liability doctrine to labor organizations, as opposed to employers, in *Local Union No. 46, Metallic Lathers (Cement League)*, 259 N.L.R.B. 70 (1981), *enforcement denied in pertinent part*, 727

F.2d 234, 237-38 (2d Cir. 1984). In *Cement League* the NLRB concluded that the United Brotherhood of Carpenters, as the successor to the International Lathers, should be responsible for remedying unfair labor practices of the Lathers, 259 N.L.R.B. at 70. The Board noted that the victims of unfair labor practices in a union affiliation context are just as needful of a meaningful remedy as are unfair labor practice victims caught by the transfer of an employing business.

The Court of Appeals for the Second Circuit refused to enforce the imposition of liability upon the Carpenters Union in *Cement League*. It did so not because it disagreed with the Board's conclusion that the latter union was the Lathers' successor, or because it considered the successor doctrine inapplicable to unions, but because it found that the Carpenters had no knowledge of the unfair labor practices at the time of the succession. See *Local Union No. 46*, 727 F.2d at 237-38. In the case at bar, by contrast, it is undisputed that Local 5741 knew of the unfair labor practice when the members of Local 9639 transferred into Local 5741.

A special master of the United District Court for the Southern District of New York recently offered the following list of factors relevant to a finding of union successorship:

"1) whether the successor union had notice of the liability;

2) the ability of the predecessor union to provide relief;

3) whether there has been a substantial continuinty of the union's operations;

4) whether the successor union uses the same offices or encompasses the same jurisdiction;

5) whether the successor union has absorbed the predecessor's membership;

6) whether the officers of the predecessor union continued in some official capacity in the successor union;

7) whether the wages, terms and conditions of employment administered by the predecessor, as set forth in the collective bargaining agreement, are the same or substantially equivalent to those administered by the successor;

8) whether the members continue to pay dues and enjoy the same membership rights; and

9) whether the members continue to work at the same trade for the same or similar employers."

EEOC v. Local 638, Sheet Metal Workers' Int'l Ass'n., 46 Emp. Prac. Dec. (CCH) ¶ 37,846 at 51,322 (S.D.N.Y. 1988); see also *EEOC V. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1094 (6th Cir. 1974).

Reviewing the foregoing list in light of the situation presented in the case at bar, we cannot say that the NLRB erred in holding Local 5741 liable as a successor. The indicia of continuity between Local 9639 and Local 5741 are more numerous and more substantial than the indicia of discontinuity.

The 55 active employees who transferred to Local 5741 continued to work in the same mines without interruption or dislocation. The mine and safety committees remained in place with the same members. Dues continued to be checked off and remitted to District 30 of the UMWA without interruption. Grievances filed before the

dissolution of Local 9639 were processed by Local 5741, and District 30 continued to be substantially involved in the grievance process, just as it had been before. Local 5741 took over representation of Local 9639's former members without any hiatus and administered the same contract previously administered by Local 9639. From the perspective of the employee who had been victimized by Local 5741, nothing in the employing industry had changed – and the need for remedying the unfair labor practice had not dissipated.

We think it is probably true, as Local 5741 contends, that it did not become Local 9639's successor voluntarily. The Landrum-Griffin Act guarantees equal rights to all persons who have fulfilled union membership requirements, 29 U.S.C. §§ 402(o), 411(a)(1); see also *Alvey v. General Elec. Co.*, 622 F.2d 1279, 1284 (7th Cir. 1980) (as modified on denial of rehearing and rehearing en banc September 16, 1980) and *Parish v. Legion*, 450 F.2d 821, 824-26 (9th Cir. 1971). The Landrum-Griffin Act does not prevent unions from reserving discretionary power to refuse membership, *Gavin v. Structural Iron Workers Local No. 1*, 553 F.2d 28, 30-31 (7th Cir. 1977), but where no such power has been reserved, applicants who meet the requirements cannot lawfully be denied membership. *Woods v. Local Union No. 613, Int'l Bhd. of Elec. Workers*, 404 F.Supp. 110, 116-18 (N.D. Ga. 1975). Because the former members of Local 9639 had fulfilled all of the requirements for membership in Local 5741, it is doubtful that Local 5741 could have excluded the transferees from membership or could have refused to represent them. See *NLRB v. Retail Clerks Union Local 1179*, 526 F.2d 142,

145-47 (9th Cir. 1975) (attempt to discipline union members by refusing to transfer their membership to another local union is contrary to national labor policy and therefore violative of NLRA); *NLRB v. Plumbers & Steam Fitters Local Union No. 100*, 491 F.2d 1104 (5th Cir. 1974) (refusing to accept members of sister locals in contravention of international's constitution was violation of NLRA); *NLRB v. Katz*, 622 F.2d 242 (6th Cir. 1980) (change of local affiliation by employees does not affect employer's obligation to recognize and bargain with union); *NLRB v. Coca-Cola Bottling Co.*, 616 F.2d 949 (6th Cir.) (employer commits unfair labor practice by withdrawing recognition after union local switches affiliation from one international to another), *cert. denied*, 449 U.S. 998 (1980).

If Local 5741 became a successor involuntarily, its knowledge of the unremedied unfair labor practice of its predecessor may be less significant than it would be otherwise. This does not mean, however, that the Board could not properly find that an imposition of liability would be equitable on the facts of this case – and it is the balancing of the equities that legitimates the Board's decision to impose liability on a successor. *Perma Vinyl Corp.*, 164 N.L.R.B. 968, 969 (1967), *enforced in part sub nom. United States Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968). As the Supreme Court has said, "the *Perma Vinyl* line of cases has involved striking a balance between the conflicting legitimate interests of the bona fide successor, the public, and the affected employee." *Gold State Bottling Co.*, 414 U.S. at 181.

In the case at hand, to repeat, there has been no real change in the employing industry insofar as the victim of

the unfair labor practice is concerned. The need for remedying the unfair labor practice remains undiminished. The predecessor union no longer exists, and it is Local 5741 that is in the best position to provide a remedy. Requiring it to do so serves the public's interest in seeing that the policies of the Act are carried out.

Although Local 5741 may not have chosen to become the defunct local's successor, Local 5741 did succeed to the dues obligations of the former members of Local 9639. As the administrative law judge correctly noted, dues payments of union members are the "economic lifeblood of a labor organization and normally its primary source of income." If these dues were not assets of Local 9639, strictly speaking, the transfer of this source of revenue is at least analogous to a transfer of income-producing assets from a predecessor employer to a successor employer.

The judgment call that the NLRB had to make in this case was not an easy one, but that should make us all the more reluctant to overturn it. Here, as in similar cases, the courts "cannot say that the Board has erred in thus 'striking [the] balance to effectuate national labor policy . . . .' " *Golden State Bottling Co.*, 414 U.S. at 187 (quoting *NLRB v. Teamsters Local 449*, 353 U.S. 87 (1957)).

The petition for review is DENIED, and the cross-petition for enforcement is GRANTED.

DUGGAN, District Judge, dissenting.

I respectfully dissent.

The majority opinion discusses many of the factors to be considered in determining whether successor liability should be imposed. It does not, however, place appropriate significance on the fact that Local 5741 did not *voluntarily* choose to become the successor to Local 9639. The majority opinion acknowledges that it is "probably true" that Local 5741 did not become the successor voluntarily. In fact, the NLRB admitted that Local 5741 " . . . was obligated to accept valid transferees as members." (NLRB brief, p.4.) This factor, in my opinion, distinguishes this case from those relied upon by the majority and by the NLRB.

Implicit in the Supreme Court's decision in *Golden State Bottling Co. v. N.L.R.B.*, 414 U.S. 168, 38 L.Ed.2d 388, 94 S.Ct. 414 (1973) is the fact that the successor chose to become the successor. The same is true in the *Perma Vinyl* decision (*Perma Vinyl Corp.*, 164 N.L.R.B., 968 (1967)), which the Supreme Court cited with approval in *Golden State*. The Supreme Court, quoting *Perma Vinyl Corp.*, stated:

> The imposition of this responsibility upon even the bona fide purchaser does not work an unfair hardship on him. *When he submitted himself* in place of the perpetrator of the unfair labor practices, he became the beneficiary of the unremedied unfair labor practices. Also his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practice.

Golden State at 419, n.2 (emphasis added). The courts' tacit assumption, in the *Golden State* and *Perma Vinyl*

opinions, is that the application of successor liability is inequitable unless the successor voluntarily agreed to assume the position of its predecessor, including the predecessor's liabilities.

The majority states that the NLRB first applied its successor liability doctrine to labor organizations in *Local Union No. 46, Metallic Lathers (Cement League)* 259, NLRB 70, (1981). Yet on appeal, the Second Circuit, while specifically declining to reach the "troublesome question whether there was a 'substantial continuity of identity' " between the predecessor and successor, refused to impose successor liability on the Carpenter's Union because it found that the Carpenter's Union had no knowledge of the unfair labor practices charges pending against its predecessor at the time the two unions affiliated. *NLRB v. Local Union No. 46, Metallic Lathers*, 727 F.2d 234, 237-38 (2nd Cir. 1984). The same principle on which the *Golden State* and *Perma Vinyl* courts relied is evident (although unexpressed) in *Local Union No. 46, Metallic Lathers*, that is, in the absence of a knowing, voluntary assumption of a predecessor's debt, a successor cannot equitably be held liable.

In sum, when a successor has no knowledge of the predecessor's liability, or when the successor has no choice but to substitute for the predecessor, as in the present case, I believe that is is unjust to burden the successor with the financial obligations of the predecessor.

Although it is undisputed in the instant case that after the transfer of members, Local 5741 began receiving a portion of each active member's dues, ranging from

$11.00 per year to $14.00 per year,[1] these *future* dues presumably were to cover the cost of *future* services to be rendered to these members. Even assuming that there were no increased administrative cost in absorbing these 55 members, the annual income received from the new members would total less than $800.00. At the same time, however, Local 5741 was required to absorb a debt of the predecessor local in excess of $10,000. Because the membership of Local 5741 could not refuse to accept Local 9639's former members, the financial burden of the defunct local should not be imposed upon Local 5741. The Board's decision to impose successor liability on an entity that did not choose to become a successor is not supported by substantial evidence on the record as a whole and I believe such decision to be clearly erroneous. The Board's petition for enforcement should be denied.

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[1] The record also reflects that a number of idle or retired members of Local 9639 also transferred to Local 5741, but the record is silent as to what amount of dues, if any, Local 5741 collects from these members.

(2)

No. 88-2132

Supreme Court, U.S.
FILED
AUG 3 1989
JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1989

LOCAL UNION NO. 5741, UNITED MINE WORKERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably found that Local 5741 was a successor to Local 9639 and liable for the unpaid backpay obligation resulting from the latter's unfair labor practice.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	16
Appendix	1a

TABLE OF AUTHORITIES

Cases:

All State Factors, 205 N.L.R.B. 1122 (1973) 12

Bates v. *Pacific Maritime Ass'n*, 744 F.2d 705 (9th Cir. 1984) 14

Boieru v. *Cuyahoga County Library Union*, 46 Empl. Prac. Dec. (CCH) ¶ 38,059 (N.D. Ohio 1988) 10

Burwell v. *Eastern Air Lines, Inc.*, 394 F. Supp. 1361 (E.D. Va. 1975) 10

EEOC v. *Sheet Metal Workers Int'l Ass'n, Local Union No. 10*, 46 Empl. Prac. Dec. (CCH) ¶ 37,846 (S.D.N.Y. 1988) 10, 13

Golden State Bottling Co. v. *NLRB*, 414 U.S. 168 (1973) 5, 7, 8, 9, 10, 11, 14

Local 28, Sheet Metal Workers' Int'l Ass'n v. *EEOC*, 478 U.S. 421 (1986) 13

NLRB v. *Local Union No. 46, Metallic Lathers*, 727 F.2d 234 (2d Cir. 1984) 6

NLRB v. *Truck Drivers Local No. 449, Int'l Bhd. of Teamsters*, 353 U.S. 87 (1957) 6

Perma Vinyl Corp., 164 N.L.R.B. 968 (1967), enforced *sub nom. United States Pipe & Foundry Co.* v. *NLRB*, 398 F.2d 544 (5th Cir. 1968) 8, 10

Ponn Distributing, Inc., 232 N.L.R.B. 312 (1977), enforcement denied *sub nom. NLRB* v. *Cott Corp.*, 578 F.2d 892 (1st Cir. 1978) 12

Statutes: Page

Bankruptcy Code, Ch. 7, 11 U.S.C. 701 *et seq.* 2
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 10
National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A) 2
§ 8(b)(2), 29 U.S.C. 158(b)(2) 2
§ 10(c), 29 U.S.C. 160(c) 11

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 865 F.2d 733. The decision and order of the Board (App., *infra,* 1a-3a), and the decision of the administrative law judge (App., *infra,* 4a-19a), are reported at 284 N.L.R.B. No. 47.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1989. A petition for rehearing was denied on March 29, 1989. The petition for a writ of certiorari was filed on June 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On February 27, 1981, following a hearing, the National Labor Relations Board found that Local Union No. 9639, United Mine Workers of America, had violated Sections 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act (29 U.S.C. 158(b)(1)(A) and 158(b)(2)), by striking at Beth-Elkhorn Corporation's mines to force the discharge of an employee for refusing to join the union. The Board's order required Local 9639 to pay the employee backpay for the earnings he lost as a result of its unfair labor practice. Local 9639's backpay liability was stipulated to be $12,327.65, plus interest, and the Court of Appeals for the Sixth Circuit enforced that order by consent of the parties. Pet. App. 2; App., *infra,* 4a-5a.

About two weeks later, Local 9639 filed a petition under Chapter 7 of the Bankruptcy Code (11 U.S.C. 701 *et seq.*), in an effort to discharge its backpay obligation. In response, the Board filed a proof of claim on behalf of the employee, and the bankruptcy court awarded him all of Local 9639's monetary assets—about $2100. The bankruptcy court did not discharge the balance of the debt. Pet. App. 2.

In the meantime, Local 9639 filed a motion with the bankruptcy court for authority to continue to operate. But after learning that its backpay obligation would not be discharged, Local 9639 withdrew its motion and simply ceased to operate. Subsequently, Local 9639 surrendered its charter to the UMW. Pet. App. 2.

At the time it ceased operations, Local 9639 represented the employees of two Beth-Elkhorn mines, all of whom were required to remain affiliated with a single local under the United Mine Workers' constitution. The UMW District Representative with responsibility for the area advised Local 9639's membership to consider joining peti-

tioner, the next closest local, and after discussion among themselves, the Local 9639 members decided to do so. Between October 21 and November 9, 1982, all of the approximately 55 working members of Local 9639 transferred their membership to petitioner. By November 23, approximately 190 of Local 9639's 243 idle or retired members also transferred into petitioner, and an additional 29 inactive members transferred by July 21 of the following year. The UMW District Representative helped facilitate the membership transfers. Pet. App. 2-3; App., *infra,* 2a n.1, 6a, 7a, 9a-10a. At the time of these transfers, petitioner concedes that it knew, through its president, that "Local 9639 had been found in violation of the National Labor Relations Act by causing the constructive discharge of [a non-union miner] by Beth-Elkhorn and was under an order to pay backpay to [the miner], and that as a result of that financial liability, had filed bankruptcy and ceased to function" (App., *infra,* 7a).

Petitioner was an older UMW local than Local 9639 and had approximately 132 active and 356 inactive members at the time of the transfers. The UMW constitution gave petitioner no choice but to accept transfers from other locals, and it received no transfer fees from the new members. It similarly received no money or property from Local 9639, given the latter's insolvency. App., *infra,* 7a, 10a n.2.

Petitioner began representing the former members of Local 9639 without any break in service. Although no Local 9639 officers became officers of petitioner, it did reappoint four former Local 9639 members to mine committees responsible for adjusting disputes at the mines previously represented by Local 9639. Petitioner also reappointed four former Local 9639 members to safety committees responsible for inspecting the former Local 9639

mines for health and safety. The reconstituted mine and safety committees handled grievances, including several that were pending at the time of the transfer. Pet. App. 4; App., *infra*, 8a, 10a.

At the same time that petitioner assumed representation of the former Local 9639 members at Beth-Elkhorn, it also began receiving those members' monthly dues. The former Local 9639 members did not execute new dues deduction authorization cards in behalf of petitioner. Instead, Beth-Elkhorn continued to remit dues to UMW District 30 in the name of Local 9639. These dues were not returned to the employer; rather, Local 9639's share was turned over to petitioner. District 30 ultimately advised Beth-Elkhorn that the Local 9639 miners had transferred into petitioner and that future dues should be submitted to District 30 in petitioner's name. Pet. App. 3; App., *infra,* 7a-8a. At the time of the transfer, the dues for working members were $32 per month, which were divided evenly among the local, the district, and the International. In 1985, the dues were increased to about $40 per month.

2. On December 4, 1985, the Board's Regional Director, noting that "questions of fact had arisen concerning the relationship between Local 9639 and [petitioner]" (App., *infra,* 5a-6a), directed that a hearing be held on whether petitioner should be made liable for the unpaid backpay.

In that proceeding, the Administrative Law Judge, "[c]onsidering all the foregoing" circumstances, was "persuaded that [petitioner] is a successor to Local 9639" (App., *infra,* 17a):

> [Petitioner] succeeded to the only shown asset of Local 9639, the future dues obligation of its membership. Moreover, it succeeded to the representation obligations of Local 9639 in the same bargaining unit

> of the same employees operating at the same location of the same employer. [Petitioner] assumed Local 9639's jurisdiction under the same international union in the same district subdivision. It succeeded, too, in administering the same collective-bargaining agreement with no changes whatsoever and apparently without any hiatus in representation. It even processed grievances originally filed with Local 9639. While the officers of [petitioner] were not the same as those of the other local, some continuity in leadership was maintained in the retention and reappointment of essentially the same mine committees and safety committees at both Beth-Elkhorn's mines 21 and 22.

The Board agreed that petitioner had become "a successor to the Respondent Local 9639 with knowledge of its backpay liability" and "adopt[ed] the [administrative law] judge's reasoning in all respects" (App., *infra,* 2a n.1).[1]

3. The court of appeals, Judge Duggan dissenting, upheld the Board's decision and enforced its order. Pet. App. 11.

Citing *Golden State Bottling Co.* v. *NLRB,* 414 U.S. 168 (1973), the court explained that "[t]he Board's

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[1] The Board further agreed that a successorship finding was appropriate based on (App., *infra,* 2a n.1):

> (1) [petitioner's] assumption of Local 9639's representation obligations with respect to the same employees at the same location; (2) [petitioner's] administration of the same collective-bargaining agreement without any hiatus; (3) the maintenance of some continuity of leadership by [petitioner's] retention of essentially the same mine and safety committees; (4) the expression of Local 9639's members' desires by their requests to transfer to [petitioner]; and (5) [petitioner's] succession to the only shown asset of Local 9639—the future dues obligations of its former members.

remedial powers under [Section] 10(c) of the Act include the power to order a bona fide successor employer who has not committed an unfair labor practice to reinstate and provide back pay to an employee wrongfully discharged by the predecessor employer" (Pet. App. 5). "The decision whether to impose such liability involves striking a balance between the conflicting interests of the innocent successor, the public, and the victimized employee, * * * and the Board is uniquely qualified to make that kind of judgment" (*id.* at 5-6).

The court concluded that the principles of *Golden State Bottling Co.* apply to a successor union. Pet. App. 5.[2] On the facts of this case, the court could not "say that the NLRB erred in holding [petitioner] liable as a successor" (*id.* at 8). Reviewing the record, the court concluded that "[t]he indicia of continuity between Local 9639 and [petitioner] are more numerous and more substantial than the indicia of discontinuity" (*ibid.*).[3] From the perspective of the victimized employee, "nothing in the employing in-

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[2] The court noted that in *NLRB* v. *Local Union No. 4[illegible], Metallic Lathers*, 727 F.2d 234 (1984), the Second Circuit refused to enforce the imposition of liability upon a successor union. See Pet. App. 7. The *Lathers* court did not quarrel with the Board's finding that a Carpenters local "was the Lathers successor," nor did it hold the successor doctrine inapplicable to unions. Instead, it found that the successor union, unlike petitioner in this case, had no knowledge of the unfair labor practices at the time of the succession. Pet. App. 7.

[3] The court explained (Pet. App. 8-9):

> The 55 active employees who transferred to [petitioner] continued to work in the same mines without interruption or dislocation. The mine and safety committees remained in place with the same members. Dues continued to be checked off and remitted to District 30 of the UMWA without interruption. Grievances filed before the dissolution of Local 9639 were processed by [petitioner], and District 30 continued to be substantially involved in the grievance process, just as it had been before. [Petitioner] took

dustry had changed—and the need for remedying the unfair labor practice had not dissipated" (*id.* at 9).

The court rejected the argument that imposition of successorship liability was inappropriate because petitioner became Local 9639's successor involuntarily. Although the court thought "it [was] probably true" (Pet. App. 9) that petitioner did not become Local 9639's successor voluntarily, it reasoned that the Board properly balanced this factor against other factors in finding that "an imposition of liability would be equitable on the facts of this case" (*id.* at 10). The court noted that "there has been no real change in the employing industry insofar as the victim of the unfair labor practice is concerned" and "[t]he need for remedying the unfair labor practice remains undiminished" (*id.* at 10-11). It further noted that petitioner "did succeed to the dues obligations of the former members of Local 9639," and "the transfer of this source of revenue is at least analogous to a transfer of income-producing assets from a predecessor employer to a successor employer" (*id.* at 11). The court concluded that "[t]he judgment call that the NLRB had to make in this case was not an easy one," but "[h]ere, as in similar cases, the courts 'cannot say that the Board has erred in thus "striking [the] balance to effectuate national labor policy" ' " (*ibid.* (quoting *Golden State Bottling Co.*, 414 U.S. at 187 (quoting *NLRB* v. *Truck Drivers Local No. 449, Int'l Bhd. of Teamsters*, 353 U.S. 87, 96 (1957))).

Judge Duggan dissented. In his view, "[t]he courts' tacit assumption, in the *Golden State* and *Perma Vinyl* opinions, is that the application of successor liability is inequitable unless the successor voluntarily agreed to assume

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over representation of Local 9639's former members without any hiatus and administered the same contract previously administered by Local 9639.

the position of its predecessor, including the predecessor's liabilities" (Pet. App. 12-13). He deemed it "unjust to burden [petitioner] with the financial obligations of [Local 9639]" (*id.* at 13), because it had no choice in accepting the transfer of former Local 9639 members.

ARGUMENT

The Board reasonably found petitioner to be a successor to Local 9639 and liable for the latter's unpaid backpay obligation even if petitioner did not become a successor voluntarily. This Court's decision in *Golden State Bottling Co.* v. *NLRB,* 414 U.S. 168 (1973), which upheld the Board's authority to impose liability for unfair labor practices on bona fide successor employers, does not—contrary to petitioner's submission—bar imposition of liability on involuntary successors. In fact, the Board's decisions have imposed successor liability in circumstances in which the successor did not assume such liability voluntarily, and neither this Court nor any court of appeals has questioned that practice. Moreover, national labor policy requires the imposition of liability on involuntary successors in certain situations in order to strike an equitable balance among the conflicting interests of the successor, the public, and the victimized employee. The case is thus one turning on its particular facts, which, as the court below held, amply support the Board's determination.

1. In *Golden State Bottling Co.,* this Court upheld the Board's *Perma Vinyl* rule[4] and recognized the Board's

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[4] In *Perma Vinyl Corp.,* 164 N.L.R.B. 968, 969 (1967), enforced *sub nom. United States Pipe & Foundry Co.* v. *NLRB,* 398 F.2d 544 (5th Cir. 1968), the Board held that when a successor employer takes over the employing enterprise, with notice of the predecessor's unfair labor practices, it is jointly and severally liable to remedy those unfair labor practices.

broad discretion to issue "reinstatement and backpay orders against bona fide successors when the Board has properly found such orders to be necessary to protect the public interest in effectuating the policies of the Act." 414 U.S. at 177. In finding that the Board in that case had struck an appropriate "balance between the conflicting legitimate interests of the bona fide successor, the public, and the affected employee" (*id.* at 181), the Court explained (*id.* at 184) that when a successor employer

> has acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations, those employees who have been retained will understandably view their job situation as essentially unaltered. Under these circumstances, the employees may well perceive the successor's failure to remedy the predecessor employer's unfair labor practices arising out of an unlawful discharge as a continuation of the predecessor's labor policies. To the extent that the employees' legitimate expectation is that the unfair labor practices will be remedied, a successor's failure to do so may result in labor unrest as the employees engage in collective activity to force remedial action. Similarly, if the employees identify the new employer's labor policies with those of the predecessor but do not take collective action, the successor may benefit from the unfair labor practices due to a continuing deterrent effect on union activities.

The Court reasoned that imposition of liability on otherwise innocent successors would achieve "[a]voidance of labor strife, prevention of a deterrent effect on the exercise of [Section 7] rights, * * * and protection for the victimized employee—all important policies" under the Act—"at a relatively minimal cost to the bona fide successor" (*id.* at

185). The Court surmised that (*ibid.* (quoting *Perma Vinyl Corp.*, 164 N.L.R.B. at 969)):

> Since the successor must have notice before liability can be imposed, "his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practices."

2. The Board and the court below concluded that the principles articulated in *Golden State Bottling Co.* are as applicable to successor unions as they are to successor employers.[5] Petitioner does not dispute that general proposition, but insists that it was inequitable to impose liability on it for Local 9639's unfair labor practice because it had no choice in accepting transfer of members from Local 9639 and therefore cannot be said to have met "the knowledge requirement articulated in *Golden State*" (Pet. 9). Petitioner maintains that the notice required by

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[5] Several district courts have recognized successor union liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* *See Boieru* v. *Cuyahoga County Library Union*, 46 Empl. Prac. Dec. (CCH) ¶ 38,059, at 52,522-52,523 (N.D. Ohio 1988) (denying union's challenge to a Title VII plaintiff's theory of successor union liability and applying same principles applicable to successor employer liability under the NLRA); *EEOC* v. *Sheet Metal Workers Int'l Ass'n, Local Union No. 10*, 46 Empl. Prac. Dec. (CCH) ¶ 37,846, at 51,322 (S.D.N.Y. 1988) ("[T]he union [defendant in this Title VII race discrimination case] argues that the general principles for a determination of successorship which have been applied to corporations are not applicable to unions. This argument is without merit."); *Burwell* v. *Eastern Air Lines, Inc.*, 394 F. Supp. 1361, 1369 (E.D. Va. 1975) (finding a "genuine issue of material fact as to the successor status" of a union local in an action under Title VII for a violation allegedly committed by its predecessor). Our research has not discovered any decision in which a court has rejected union successor liability.

Golden State Bottling Co. really means voluntary assumption of liability, because notice is meaningless if a party cannot act on it. In petitioner's view, *Golden State Bottling Co.* and Section 10(c) of the NLRA, 29 U.S.C. 160(c), implicitly contain a per se rule barring imposition of liability on involuntary successors. That contention is in error.

a. The *Golden State Bottling Co.* Court did not make successor liability contingent upon the availability of compensation or indemnification. While the Court required "notice before liability can be imposed" (414 U.S. at 185), it plainly placed "emphasis upon protection for the victimized employee" (*id.* at 181) above the interests of the bona fide successor. Compensation and indemnity merely reduced the cost of extending that protection and effectuating the purposes of the labor act. The Court did not hold that protection was extended *because* the cost would be minimal in most cases. To the contrary, because the availability of compensation and indemnification affects the burden on bona fide successors, it is a matter for the Board to take into the calculus when it balances the competing equities and arrives at a result that will best effectuate the policies of the Act. Indeed, *Golden State Bottling Co.*'s explanation of the mechanics of compensation and indemnification makes clear that innocent successors will not always be able fully to protect themselves. For example, unfair labor practices committed after the parties have contracted to sell the enterprise but before ownership has been transferred may not be reflected in the terms of sale, leaving the successor without contractual protection. For similar reasons, sale of a financially troubled company before backpay has been specified—the situation in *Golden State Bottling Co.* itself (414 U.S. at 170 & n.1)—may leave the successor unable to seek indemnifica-

tion and insufficiently informed to adjust the purchase price accurately.

b. Consistent with *Golden State Bottling Co.*, the Board has found employers to be successors when they had little choice as to whether they would take over an enterprise, and no realistic possibility of indemnifying themselves. In *Ponn Distributing, Inc.*, 232 N.L.R.B. 312, 314 (1977), enforcement denied on other grounds *sub nom. NLRB* v. *Cott Corp.*, 578 F.2d 892, 895 n.6 (1st Cir. 1978), and *All State Factors,* 205 N.L.R.B. 1122, 1124, 1126-1127 (1973), secured creditors took over failing businesses only to protect their threatened security interests. In both cases, the creditors unsuccessfully argued that they should not be found to be successors since, as a practical matter, they had no way to recoup their added liability from the assets they would obtain from the financially troubled predecessor. As these cases illustrate, the need to protect the victimized employee and further the purposes of the national labor laws makes it reasonable for the Board to impose successor liability on employers—even in circumstances in which they did not assume those obligations voluntarily. The same considerations also justify imposing liability on successor unions irrespective of the voluntariness of the successorship.

c. National labor policy precludes wholesale exemption of involuntary successors because it would give employers and unions a blueprint for minimizing the consequences of their unfair labor practices. Accepting petitioner's view would allow unions to organize themselves into small, judgment-proof units that would become insolvent whenever an individual local was found to have committed an unfair labor practice. While the victimized employee would be without a remedy, the defunct local's members would transfer to another local that would

assume its predecessor's collective-bargaining responsibilities without missing a dues payment.[6] In sum, the decision below does not conflict with any decision of this Court or any other court, and raises no question of policy that warrants further review.

3. Since involuntary successors enjoy no blanket exemption from the imposition of liability, the present case turns entirely on its particular facts, and on those facts the record amply supports the Board's determination. As indicated above, petitioner reconstituted Local 9639's mine and safety committees, processed preexisting grievances, collected dues designated for its predecessor, and took up the representation of Local 9639's miners where Local

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[6] The risks in automatically exculpating involuntary successors are illustrated by the background and subsequent history of *Local 28, Sheet Metal Workers' Int'l Ass'n* v. *EEOC*, 478 U.S. 421 (1986). Local 28 had been found guilty of egregious violations of Title VII by discriminating against nonwhite workers in recruitment, selection, training, and admission to the union. This Court affirmed the lower courts' orders providing for substantial race-conscious relief. On remand (*EEOC* v. *Sheet Metal Workers Int'l Ass'n, Local Union No. 10*, 46 Empl. Prac. Dec. (CCH) ¶ 37,846 (S.D.N.Y. 1988)), another union local—Local 10, which had also been found guilty of violating Title VII—merged into Local 28 by order of the International union. When the beneficiaries of the judgment against Local 10 sought relief against Local 28 as a successor union, Local 28 countered that the merger of Local 10 into it was involuntary and stemmed from actions by the International union—just as petitioner argues in this case. The district court rejected the argument (*id.* at 51,328) on grounds of policy:

> If I were to accept Local 28's argument that it is not the successor to Local 10, the victims of Local 10's alleged conduct would be subjected to the extinguishment of substantial rights. * * * Such a course of action would undermine Title VII and afford any union in a similar situation an easy out. All they would need do is be merged into an "innocent" local, claim the merger was forced upon them, and contend that they had no notice.

9639 had left off. Under these circumstances, "the employees may well perceive the successor's failure to remedy the predecessor['s] * * * unfair labor practices * * * as a continuation of the predecessor's labor practices" (*Golden State Bottling Co.*, 414 U.S. at 184). For this reason, petitioner may well have profited from its predecessor's unfair labor practice by maintaining an implicit threat against failures to join the union. Indeed, the manner in which petitioner stepped into its predecessor's role casts doubt on the assumption that its successorship was truly "involuntary," and this doubt is underscored by the fact that it is the UMWA's constitution, not federal law, that required petitioner to accept inter-local membership transfers.[7]

4. Finally, in addition to the "traditional factors, other equitable concerns do not counsel against the imposition of successor liability." *Bates* v. *Pacific Maritime Ass'n*, 744 F.2d 705, 711 (9th Cir. 1984). Even if petitioner did not assume successor liability voluntarily, it achieved some measure of compensation in the form of future dues of Local 9639's former members. The parties' stipulation (JX 4, para. 5) shows that petitioner would receive $ 0.70 *per month* per employee, from 1982 through January 1985;

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[7] As the court below noted (Pet. App. 9), although "[t]he Landrum-Griffin Act guarantees equal rights to all persons who have fulfilled union membership requirements, 29 U.S.C. [Sections] 402(o), 411(a)(1)," it "does not prevent unions from reserving discretionary power to refuse membership, *Gavin v. Structural Iron Workers Local No. 1*, 553 F.2d 28, 30-31 (7th Cir. 1977)." The International presumably is free, if it desires, to accord its locals some discretion in accepting transfers, in which case successor liability could have been avoided. There is thus no merit to petitioner's contention (Pet. 10) that it would have violated federal law had it not accepted the Local 9639 transferees as members.

$13.35 per month until October 1985; and $13.60 per month thereafter.[8] Thus, the active, working members of Local 9639 who transferred to petitioner paid dues to petitioner at the annual rate of $3852, $4806, and $4896, respectively, during the three periods. In addition, the stipulation reveals (*ibid.*) that inactive members who transferred paid dues to petitioner at the rate of $3 per year, providing an additional $660 per year to petitioner from the 220 inactive transfers (*id.* para. 1). In total, petitioner received between $4500 and $5500 per year in additional revenues, to be balanced against the approximately $10,000 liability that it inherited as Local 9639's successor. Moreover, equal amounts were received by District 30 and by the International, and it is within their power to relieve petitioner of any remaining financial burden.

[8] Not *per year*, as the dissent assumed (Pet. App. 13-14) in calculating that petitioner only would receive $800 per year from the former Local 9639 members.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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Solicitor General

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Deputy Associate General Counsel

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National Labor Relations Board

AUGUST 1989

APPENDIX

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD

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284 NLRB No. 47 Case 9–CB–4482–2

LOCAL UNION NO. 9639, UNITED MINE WORKERS OF AMERICA AND LOCAL UNION NO. 5741, UNITED MINE WORKERS OF AMERICA (BETH-ELKHORN CORPORATION)

and

TOMMY E. COOK, AN INDIVIDUAL

SUPPLEMENTAL DECISION AND ORDER

On 22 April 1986 Administrative Law Judge Hutton S. Brandon issued the attached decision. The Respondent Local 5741 filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd.

adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders

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188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found, and we agree, that Respondent Local 5741 became a successor to the Respondent Local 9639 with knowledge of its backpay liability and is jointly and severally liable for the balance of backpay due discriminatee Cook. In finding Local 5741 to be a successor labor organization, the judge relied on: (1) Local 5741's assumption of Local 9639's representation obligations with respect to the same employees at the same location; (2) Local 5741's administration of the same collective-bargaining agreement without any hiatus; (3) the maintenance of some continuity of leadership by Local 5741's retention of essentially the same mine and safety committees; (4) the expression of Local 9639's members' desires by their requests to transfer to Local 5741; and (5) Local 5741's succession to the only shown asset of Local 9639—the future dues obligations of its former members. We adopt the judge's reasoning in all respects.

We specifically reject the Respondent's contention that the judge's finding number (5) above is contrary to the parties' stipulation that no money or property of Local 9639 was transferred to Local 5741. In context, we find that the stipulation addresses the nature of the relationship between the two locals at the time of the transfer. The stipulation does not encompass future dues obligations or decide the question whether they constitute an asset. It is undisputed that Local 5741 has received the benefits of the union dues paid by the former Local 9639 members. We conclude that the judge properly found such dues payments constituted an asset to which Local 5741 succeeded and that his finding did not contravene the parties' stipulation.

The phrase "both house talk" in sec. B of the judge's decision should read "bath house talk." We also note that 29 additional retired members of Local 9639, not 25 as stated by the judge, transferred to Local 5741 by 21 July 1983.

[2] Interest on backpay shall be computed as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

that the Respondent, Local Union No. 5741, United Mine Workers of America, Letcher County, Kentucky, its officers, agents, and representatives, shall take the action set forth in the Order.

Dated, Washington, D.C. 18 June 1987

Donald L. Dotson, Chairman

Wilford W. Johansen, Member

Mary Miller Cracraft, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

Case 9-CB-4482-2

LOCAL UNION NO. 9639, UNITED MINE WORKERS OF AMERICA (BETH-ELKHORN CORPORATION)

and

LOCAL UNION NO. 5741,
UNITED MINE WORKERS OF AMERICA

and

TOMMY E. COOK, AN INDIVIDUAL

Andrew L. Lang, Esq., for the General Counsel.
James R. Hampton, Esq., Hazard, KY, for Respondent Local Union No. 5741.

SUPPLEMENTAL DECISION

Statement of the Case

HUTTON S. BRANDON, Administrative Law Judge. On 27 February 1981, the Board issued its order in this proceeding adopting, in the absence of exceptions, a decision of an administrative law judge finding that Local Union No. 9639, United Mine Workers of America, herein called Local 9639, had violated Section 8(b)(1)(A) and (2) of the

Act by causing Beth-Elkhorn Corporation to constructively discharge Tommy E. Cook on 30 August 1979. The Board adopted the judge's recommended order which required Local 9639, its officers, agents, and representatives, to make Cook whole for any loss of earnings or other benefits he suffered as a result of the unlawful discrimination against him. On 31 July 1981, the Regional Director for Region 9 of the Board issued a backpay specification and notice of hearing alleging that the backpay due Cook under the Board's order was $12,327.65, plus interest. Thereafter on 4 June 1982, Local 9639, Cook, and the General Counsel entered into a stipulation and motion to transfer the case to the Board with respect to the backpay due. The Board in a supplemental order dated 8 July 1982 approved the stipulation which also provided for entry of a consent judgment by any appropriate United States Court of Appeals. The Board's supplemental order was enforced by the United States Court of Appeals for the Sixth Circuit on 19 August 1982.

On 3 September 1982, Local 9639 filed a petition in bankruptcy under Chapter 7 (liquidation) of Title 11 United States Code. The United States Bankruptcy Court, Eastern District of Kentucky (Pikeville division) appointed a trustee for liquidation of Respondent's assets, and the Board, on behalf of Cook, filed a proof of claim in the bankruptcy court.[1] The assets of Local 9639's estate in the amount of $2,102.63 were paid to Cook by order of the bankruptcy court entered on 31 July 1985. The remaining debt owed to Cook was not discharged by the bankruptcy court.

On 4 December 1985, the Regional Director for Region 9 of the Board issued an order directing supplemental hearing and notice of hearing in which it was alleged that

[1] Case Number 82-00098.

questions of fact had arisen concerning the relationship between Local 9639 and Local Union No. 5741, United Mine Workers of America, herein called Local 5741. The issue framed by the order directing supplemental hearing and Local 5741's answer thereto is whether Local 5741 is jointly and severally liable with Local 9639 for the balance of backpay due Cook, as a successor labor organization of Local 9639. The matter came to hearing on 27-28 February 1986 at Pikeville, Kentucky.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and Local 5741, I make the following:

Findings of Fact

A. *The Material Facts*

The significant facts in this case are not in dispute. Local 9639 represented certain employees of Beth-Elkhorn Corporation at its mine numbers 21 and 22. A collective-bargaining agreement covering these employees, the National Bituminous Coal Wage Agreement of 1981 (NBCWA), was negotiated by the United Mine Workers of America, herein called the International. The agreement was administered more directly by Local 9639 at the local level. Dues of unit employees were deducted by Beth-Elkhorn pursuant to employee checkoff authorizations and were remitted in the name of Local 9639 to District 30, United Mine Workers of America, herein called District 30. It is clear that Local 9639 was a constituent part of the District. It was among the duties of District 30 to divide the dues paid remitting a third to Local 9639, another third to the International, and keeping a third for itself.

The parties stipulated that upon discovery that Local 9639 would not obtain a discharge of the debt owed to

Cook on 27 September 1982, Local 9639 withdrew its motion in bankruptcy court, filed on or about 7 September 1982, for authority to continue to operate. Thereafter, Local 9639 ceased to function and later surrendered its charter to the International. The General Counsel and counsel for Local 5741 further stipulated that between 21 October and 9 November 1982, all of the approximately 55 working members of Local 9639 transferred their membership into Local 5741 and by 23 November 1982 approximately 190 out of 243 idle or retired members of Local 9639 also transferred their membership to Local 5741. By 21 July 1983, 29 additional retired members of Local 9639 transferred into Local 5741. Nineteen additional retired members transfered into other locals of the International. It was further stipulated that at the time of these transfers, Local 5741 through its president, Bill Baker, knew that Local 9639 had been found in violation of the National Labor Relations Act by causing the constructive discharge of Tommy Cook by Beth-Elkhorn and was under an order to pay backpay to Cook, and that as a result of that financial liability, had filed bankruptcy and ceased to function. The parties herein agreed that no money or property Local 9639 was transferred to Local 5741.

Local 5741 was an older local than Local 9639 and at the time of the transfers from Local 9639, Local 5741 had approximately 132 active, and 356 inactive members. Inasmuch as no transfer fee is required for transfer of membership from one local to another within the International, no such fees were paid by the members of Local 9639 upon transferring into Local 5741. Furthermore, such transferees did not execute new dues deduction authorization cards in behalf of Local 5741. Beth-Elkhorn continued to remit dues to District 30 for former Local 9639 members who had transferred into Local 5741. These remissions were in the name of Local 9639 until at least

December 1982 when, by letter dated 27 December 1982, Bobby Roy Justice, secretary-treasurer of District 30, advised Beth-Elkhorn that Local 9639 men had transferred into Local 5741 and requested that in the future their dues and assessments be submitted under the name of Local 5741. It was stipulated that those dues remitted by Beth-Elkhorn under the name of Local 9639, after that local ceased to operate and before Justice's 27 December letter, were not returned to Beth-Elkhorn by District 30. Local 5741 admitted that it had received the benefits of the union dues paid by the former members of Local 9639.

Local 5741 further admitted at the hearing herein that at all times since the transfer of the former members of Local 9639, Local 5741 has acted as the collective bargaining representative of such employees of Beth-Elkhorn at mines 21 and 22 and has assumed the rights and obligations incidental the administration of the collective-bargaining agreement. It was stipulated that no Local 9639 officers became officers of Local 5741 upon transfer of their membership until 1984 when Randy Robbins, former recording secretary of Local 9639, was elected vice-president of Local 5741. However, Local 9639 had three members on a mine committee at mine 21 and an equal number on a safety committee at that mine, all of whom were reappointed to those positions by the president of Local 5741 upon the transfer of 9639 members into that local. The same was true of the one mine committee member and one safety committee member utilized at mine 22. It was the duty of the mine committee to see to the adjustment of disputes arising under the collective-bargaining agreement while the function of the safety committee was to promote employee concerns regarding mine health and safety and to inspect and insure safe working conditions.

District 30 was also substantially involved with the local union's representation of members both in processing of grievances and in other miscellaneous matters. For example, under the NBCWA, the District was involved in the grievance procedure for the settlement of disputes including discharges. Moreover, as pointed out by the General Counsel's brief, Article V, Section 3, of the Constitution of District 30 provides:

> The District Executive Board shall be responsible for implementing and administering collective-bargaining agreements covering any member of the District, taking all necessary and appropriate measures to ensure that it is fairly applied, fully enforced, and faithfully obeyed.

The same constitution also calls for district executive board members and field representatives to aid in the administration of all collective-bargaining agreements and to aid and advise local unions in various matters including the accounting and handling of union funds and the administration of affairs of the local unions. There was record testimony that District Field Representative Bill Looney assisted members of Local 9639 in their transfer into Local 5741 and was present at a membership meeting of the latter local when the transfers were discussed on 9 October 1982. More specifically, Randy Robbins, recording secretary for Local 9639, testified that he filled out the transfer cards for the individual members of the Local and put the seal of the Local on them. Robbins then turned the cards over to Looney who completed the execution of the cards and distributed them to the members when they asked for them. Moreover, Jerry Puckett, former president of Local 9639, testified that it was Looney who told Local 9639 members that it would be best to go into 5741 because it was closest geographically to them. Neverthe-

less, the record does not establish a definitive group decision for the transfer of employees from Local 9639 to Local 5741. Rather, a consensus of the testimony is that as a result of "both house talk," former Local 9639 members individually concluded that Local 5741 was the most reasonable union to transfer into inasmuch as it was closest geographically to them and the mines in which they worked.[2]

It is undisputed that Local 5741 took over the representation of Local 9639's former members at Beth-Elkhorn's mines 21 and 22 without any hiatus. In short, Local 5741 administered the same contract previously administered by Local 9639. Moreover, according to the testimony of Local 9639's former president, Jerry Puckett, Local 5741 processed grievances of employee members of Local 9639 that were in existence prior to the time of the transfers.

William R. Back, recording secretary for 5741, testified that he had no alternative but to accept the transfers of Local 9639's men since each transfer had the seal of Local 9639 on it as well as the signature of the member seeking the transfer. Local 5741's President Baker testified that a transfer slip would be issued a member seeking to transfer into another local unless it appeared that member was continuing to work within the jurisdiction of the local union from which the transfer was sought.

B. ***Contentions of the Parties***

The General Counsel concedes there appears to be no precedent precisely controlling in this case. However, the

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[2] It was clear that to retain International membership it was necessary for all of the employees to transfer into the same local, for Article 10, Section 4 of the International Constitution provides that "No mine shall be under the jurisdiction of more than one Local Union. . . ."

argument is made that a number of Board decisions on facts similar to those in the instant case have indicated the Board's willingness to impose on a successor union the liability for remedying the unfair labor practices of its predecessor. Two cases cited to support this argument were *Venetian Blind Workers' Union Local No. 2565,* 110 NLRB 780 (1954) and *Iron Workers, Local 600 & Local 798 (Bay City Erectors),* 144 NLRB 1049 (1963). Both cases, however, as Respondent's brief points out, involve facts from which the Board could and did conclude that the new unions were simply disguised continuances or alter egos of the unions which were initially responsible for the unfair labor practices. In a third case cited by the General Counsel, *Local Union No. 46, Metallic Lathers (Cement League),* 259 NLRB 70 (1981), enfd. denied 727 F.2d 234 (2d Cir. 1984), the Board, applying its *Perma Vinyl*[3] doctrine for the first time to labor organizations, concluded that the United Brotherhood of Carpenters were obligated to remedy the unfair labor practices of the Lathers Union which had affiliated with the Carpenters after the commission of the unfair labor practices, the Carpenters having had knowledge of the unfair labor practices prior to the affiliation. The *Perma Vinyl* doctrine holds that a bona fide successor employer who has knowledge of a pending unfair labor practice by a predecessor at the time of its purchase of the predecessor's business must be responsible for remedying those unfair labor practices. While the court in *Local 46, Metallic Lathers,* supra, refused to enforce the Board's decision, it did so only because of its disagreement with the Board's findings that the Carpenters'

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[3] *Perma Vinyl Corp., Dade Plastics Co.,* 164 NLRB 968 (1967), enfd. sub. nom. *United States Pipe Foundry Co. v. NLRB,* 398 F.2d 544 (5th Cir. 1968).

union was aware of the pendency of the unfair labor practice matter at the time of the affiliation.

The General Counsel asserts that liability should be imposed here against Local 5741 particularly because Local 9639 filed its petition in bankruptcy specifically to escape its backpay obligation to Cook. Moreover, Local 5741 as well as District 30 was aware of the backpay obligation at the time of the membership transfer in Local 5741 was effectuated.

Local 5741 raises a number of arguments in its defense. First, it asserts that the Board's order in the decision against Local 9639 did not run to the successors or assigns of that local. Accordingly, it concludes that no liability can be imposed on Local 5741 even if it is found to be a successor. Secondly, it contends that Local 5471 cannot be a successor because Local 9639's assets were liquidated in bankruptcy proceedings. Where there are no assets, there can be no successorship. Thirdly, it contends that members of Local 9639 cannot be held liable for the Local's actions, and since Local 9639 has ceased to exist, regardless of its motivation in dissolving, any attempt to assess further liability would be tantamount to holding the individual members liable. Fourthly, Local 5741 argues that in any event, even if it is a successor under court precedent, it cannot be held liable beyond the value of assets received from Local 9639. Since Local 5741 received no such assets, no liability can be imposed. Finally, Local 5741 contends that it is neither an alter ego, disguised continuance, nor successor to Local 9639 and that under all the circumstances of this case an imposition of 9639's debt upon 5741 would constitute an unfair hardship on it not justified by any national policy.

C. *Conclusions*

Local 5741's initial defense that the Board's initial order in this case does not extend to successor's appears to have been answered in *Venetian Blind Workers'* case, supra. There, the Board, largely relying upon *Southport Petroleum Co. v. NLRB*, 315 U.S. 100 (1942) and *Regal Knitwear Co. v. NLRB*, 324 U.S. 9 (1945), held that if a party may probably be characterized as a successor or disguised continuance of the party against whom the original Board order was issued, it may be held liable under the order even in the absence of language in the order extending to successors and assigns. Thus, the determination of whether a party falls within the scope of a Board order is dependent upon its relationship to the party against who the order clearly runs rather than upon the construction of the literal terms of the order. Accordingly, I conclude that the failure of the Board's original order in the instant case to extend to "successors or assigns" does not in itself preclude liability of Local 5741 if it is found to be a successor to Local 9639.

The second argument of Local 5741 is premised upon the liquidation of Local 9639. There being no surviving assets from the bankruptcy liquidation, the argument goes, there can be no successorship. For support of this proposition, Local 5741 relies upon *Seeburg Corp. v. NLRB*, 105 LRRM 3355 (N.D. Ill. 1980). The argument, however, presumes that a succession to physical assets is a prerequisite to establishing successorship status. Such a presumption may be valid in application in a bankruptcy proceeding involving employers as in *Seeburg Corp.* However, it would clearly have no application in situations involving a union's disguised continuance of a prior labor organization dissolved to evade its obligations. See, for e.g. *Iron Workers, Local 600*, supra. Likewise, it

would appear to have little application in union successorship situations where, as here, one union succeeds not only to the status of collective-bargaining representative of employees formerly represented by the predecessor but also to administration of the same collective-bargaining agreement formerly administered by the predecessor.

Contrary to Local 5741's third argument, a finding of successorship under the circumstances of this case does not render members personally liable for the unlawful actions of the predecessor. It is true that it is the union itself and not its individual members that must respond for union wrongs. *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962). But imposing upon a successor union the liabilities of a predecessor does not constitute the imposition of liability upon individual members. For this reason, *Local 14055, Steelworkers (Dow Chemicals Co.)*, 229 NLRB 302 (1977) and *Dixie Carriers, Inc. v. Maritime Union*, 57 LRRM 2175 (S.D. Tex. 1964), cited by Local 5741 are inapposite. In neither case was a successorship found.

Local 5741 sees *Teamsters Joint Council No. 43 v. Buffalino*, 121 LRRM 2365 (E.D. Mich., 1985) as substantiating its fourth argument that even if it is deemed a successor, Local 5741 could be liable for the predecessor's backpay obligation only to the extent of the assets it received from that local. Since no assets were assumed, no liability can attach. In deciding the cited case, the court held that a joint council of the international, as interim successor, was liable for the just debts of the local union whose charter had been revoked, but it limited such liability to the extent of the assets received from the local. This limitation, it appears, was based upon an analogy drawn by an earlier court in *Lawless v. Brotherhood of Painters*, 300 P.2d 1591, 38 LRRM 2571 (1956), to cases involving a transfer by a corporation of its assets to a successor corpo-

ration without a merger. In that situation, a creditor can trace only the transferor's physical assets in the hands of the transferee. Moreover, the court in *Buffalino*, while following the *Lawless* analogy and result, further supported its own decision with the observation that the holding was consistent with a provision in the international union's constitution in that case asserting that the international was not responsible for the obligations of a subordinate body which surrendered its charter. No such constitutional provision has been cited as applicable in the instant case. Further, the court in *Buffalino* was not faced with the frustration of the effectuation of a remedy for a violation of a statute as here. Application of *Buffalino* here would result in exactly that frustration, and accordingly, I find that it is not controlling.

In addition, and in any event, I find merit in the General Counsel's counter argument to *Buffalino* that the future dues obligations of the members of Local 9639 constituted a major asset to which Local 5741 succeeded. Dues payments of its members are the economic life blood of a labor organization and normally its primary source of income. Succession to dues obligations in a very real sense is a substantial asset. Indeed, it was a stake created by the collection of dues by the interim successor in the *Buffalino* case which was the subject of the litigation there. The dues of the members herein were like the dues of the members in *Buffalino*, an obligation of membership. Article XIII, U.M.W.A. Constitution. Local 5741 even received its share of the dues checked off from the former Local 9639 members without the necessity of new checkoff authorizations, the original checkoffs having been executed in the name of the International. Under these circumstances, Local 5741's share of the future dues payment of former Local 9639 members qualifies as a valid asset. Therefore,

even if the *Buffalino* holding is applicable here to otherwise limit Local 5741's liability to the extent of Local 9639's assets, I find that such assets would include the future dues payment of the latter Local's former members.

I concur in Local 5741's fifth argument that it is not an "alter ego" or "disguished continuance" of Local 9639. Local 5741 was, the record shows, an older and larger local. Former members of Local 9639 were outnumbered by the regular Local 5741 members by 2 to 1. The officers of Local 5741 were not the same or even substantially the same as those of Local 9639. And there was no merger, consolidation, or affiliation action here involved which might establish a "continuation" of the old entity. Cf. *National Carbon Co.,* 116 NLRB 488, 500-502 (1956); *American Enka Co.,* 231 NLRB 1335, 1336 (1977). All these circumstances taken together militate against a finding of an alter ego or a disguised continuance.

The foregoing does not prevent the finding of the existence of a successorship, however. No cases have been cited herein or otherwise ascertained through research which presents facts precisely paralleling the facts in the instant case and controlling it. Nevertheless, the Board in *Local 294, Teamsters (Gene Graham Ford, Inc.),* 188 NLRB 515, 518, (1971), did outline the factors considered in establishing union successorships stating:

> In deciding whether a union is a successor [to another union in any particular unit], the Board looks to a number of factors, including whether democratic procedures have been followed in any vote on affiliation or merger, whether the new organization has succeeded to the assets and liabilities of the predecessor, whether the employees in the bargaining unit have had an opportunity to register their desires, and whether there is continuity in the leadership and

> representation of the employees in the bargaining unit.

And in *Lord Jim's*, 259 NLRB 1162, 1164 (1982), the administrative law judge concluded, with apparent Board approval, that in union successorship cases "the primary concern" is whether the employees in the unit had an opportunity to pass upon the change of representative.

The foregoing factors or criteria are most readily applied in merger or affiliation situations not present in the instant case. However, as already discussed, Local 5741 succeeded to the only shown asset of Local 9639, the future dues obligation of its membership. Moreover, it succeeded to the representation obligations of Local 9639 in the same bargaining unit of the same employees operating at the same location of the same employer. Local 5741 assumed Local 9639's jurisdiction under the same international union in the same district subdivision. It succeeded, too, in administering the same collective-bargaining agreement with no changes whatsoever and apparently without any hiatus in representation. It even processed grievances originally filed with Local 9639. While the officers of Local 5741 were not the same as those of the other local, some continuity in leadership was maintained in the retention and reappointment of essentially the same mine committees and safety committees at both Beth-Elkhorn's mines 21 and 22. And with respect to the "primary concern" in union successorship cases, although there was no evidence of a formal vote among Local 9639's members concerning their desires to tranfer into Local 5741, it is quite clear that they individually sought transfer into Local 5741 with the assistance, if not direction, of District 30, and in that manner "registered" their desires.

Considering all the foregoing, I am persuaded that Local 5741 is a successor to Local 9639. I further find that

Local 5741 had knowledge of the outstanding unfair labor practice violation by the predecessor union prior to the time it achieved successorship status. I find unpersuasive and thus do not credit the testimony of Local 5741's president Bill Baker to the effect that he believed at the time of the transfers of the former Local 9639 members that the backpay liability of that local was discharged by the bankruptcy proceedings. Given the fact that the parties herein stipulated that the bankruptcy proceeding was filed because of the backpay obligation owed Cook, had such debt been discharged, there would not have been no need for dissolution of Local 9639 and the transfer of its members into Local 5741. Thus, it would have been unreasonable for Baker to expect otherwise.

Since Local 5741 had knowledge of the backpay obligation owed to Cook, the Board's principles announced in *Local 46, Metallic Lathers,* supra, and *Perma Vinyl,* supra, are fully applicable here. Local 9639 is no longer a viable organization capable of remedying its violation of the Act. The employing enterprise here has not changed insofar as Cook, the victim of Local 9639's past unfair labor practice, is concerned, nor has the need for remedying the unfair labor practice. Local 5741 is not only the best but also the only organization capable of remedying the violation of Local 9639. As the successor to Local 9639, I conclude that it must do so.

Contrary to the arguments of Local 5741, I find no national labor policy against imposing liability against it in this case as a successor. Whatever hardship results from the finding of liability on Local 5741's part, which I make here, must be subservient to the damage caused to the victim of the predecessor's unfair labor practice. As was recently noted in *NLRB v. Jarm Enterprises, Inc.,* 121 LRRM 3105 (7th Cir. 1986), citing *Golden State Bottling Co., Inc. v. NLRB,* 414 U.S. 168 (CA 9 1973), the basis

for the *Perma Vinyl* principle is not focused on the conduct of the successor, but rather the need to prevent mere changes in title to business from frustrating national labor of policy remedying unfair labor practices. It is true, unlike in employer successorship situations, Local 5741 could make no "adjustment in purchase price" to compensate for the backpay obligation of the predecessor. However, it was not compelled to assume representation of former Local 9639's members with their employer, and may not in equity now escape that Local's remedial obligations of which Local 5741 was aware.

Upon the foregoing findings and conclusions, and upon the entire record, I issue the following recommended:[4]

ORDER

That Local Union No. 5741, United Mine Workers of America, as successor to Local Union No. 9639, United Mine Workers of America, make whole Tommy E. Cook with interest for any unpaid balance of the backpay obligation arising out of the Board's supplemental order in Case 9-CB-4482-2 dated 8 July 1982.

Dated, Washington, D.C. 22 April 1986

/s/ HUTTON S. BRANDON
Hutton S. Brandon
Administrative Law Judge

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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